Before DANAHER, BURGER and WRIGHT, *Circuit Judges*.

PER CURIAM: Under circumstances to be described, the National Mediation Board certified the Teamsters[1] as collective bargaining representatives of a craft employed by Aeronautical Radio, Inc. (ARINC). The company, which is subject to the Railway Labor Act, provides air-ground communications to the nation's airlines throughout the United States, Puerto Rico and Okinawa.

In No. 20128, ARINC seeks reversal of a District Court order which for lack of subject matter jurisdiction had dismissed ARINC's complaint after ARINC had sought to have the Board's certification set aside.

In No. 20251, Teamsters contend that as intervenors in ARINC's action, they were entitled to summary judgment on their counterclaim seeking a mandatory injunction to compel ARINC to bargain with them.

In December 1964, the Teamsters filed an application under section 2, Ninth, of the Railway Labor Act, 45 U.S.C. § 152 (1964), for certification as the bargaining representative of a 400 member craft. Shortly thereafter the Air Line Dispatcher Association, AFL-CIO (ALDA), upon its request, was made a party to the dispute.

The National Mediation Board held hearings and directed an election to be held. The election was conducted by mail. The ballots provided spaces for a vote for the Teamsters, for a vote for ALDA, and one in which an employee could write in the name of "Any Other Organization or Individual." The ballot also provided "No employee is required to vote. If less than a majority of the employees cast valid ballots, no representative will be certified."

The count of the ballots revealed that 147 employees had voted for the Teamsters, 74 had voted for ALDA,

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[1] International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

but 179 did not vote or submitted void ballots.[2] The Board thereupon certified the Teamsters as the authorized representative of the craft, whereupon ARINC in the District Court sought to have the Board's certification set aside.

Before ARINC's action was dismissed for lack of subject matter jurisdiction, the Teamsters were granted leave to intervene as party defendant. They filed an answer and a counterclaim[3] seeking a mandatory injunction to compel ARINC to bargain with them. The District Court denied the Teamsters' motion for summary judgment on its counterclaim.

I

Turning first to the dismissal of ARINC's complaint, it is clear that the jurisdiction of the courts to review employee representation proceedings is extremely limited. *Switchmen's Union* v. *Board,* 320 U.S. 297, 305 (1943); *Railway Clerks* v. *Employees Assn.,* 380 U.S. 650 (1965); *Bro. of Ry. & S.S. Clerks, etc.* v. *National Mediation Board,* —— U.S.App.D.C. ——, ——, 374 F.2d 269, 272 (1966). We are not here presented with a situation in which the Board acted "in excess of its delegated power and contrary to specific prohibition in the Act." *Leedom* v. *Kyne,* 358 U.S. 184, 188 (1958).

ARINC argues that the Board has failed to perform its duty to "investigate" as required by section 2, Ninth, of the Railway Labor Act. Cf. *Railway Clerks* v. *Employees Assn.,* 380 U.S. at 661-668. As the Court commented, "This command is broad and sweeping. We should note at the outset that the Board's duty to inves-

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[2] All parties agree that these last 179 should be considered as votes for no union. Of this number, 25 ballots were found to be void.

[3] Thereafter ARINC filed an answer and a counterclaim seeking an injunction against a threatened strike. ARINC's counterclaim is still pending.

tigate is a duty to make such investigation as the nature of the case requires." *Railway Clerks* v. *Employees Assn.*, 380 U.S. at 662. Here the Board investigated to the extent of holding an election, ascertaining the results, and designating a bargaining representative. ARINC claims, however, that this "investigation" was deficient in that the results of the election would not permit a rational and non-arbitrary conclusion that the Teamsters were the choice of the majority.

The Board's certification reflects a conclusion that since a majority of the employees obviously had voted for *some* representation, the union which became the choice of a majority of those thus voting should be certified. The ballot had expressly provided that if "less than a majority of the employees cast valid ballots, no representative will be certified." Even after taking account of the fact that failure to vote at all is to be treated as a vote for no representation and that the same is true of failure to cast a valid ballot, it is clear that the Board was entitled to view the circumstances in light of the "practicalities of voting the fact that many who favor some representation will not vote . . . ." *Railway Clerks* v. *Employees Assn.*, 380 U.S. at 669 n.5. To reiterate, more than a majority of the craft voted for union representation. Of those a majority, as noted, had selected the Teamsters, and we think the Board reached a permissible conclusion. In the context of all factors discussed, we will not say that the "investigation" was insufficient, cf. *Virginian Ry.* v. *Federation*, 300 U.S. 515, 559-562 (1937), for it is clear that the "details of selecting representatives were to be left for the final determination of the Board." *Railway Clerks* v. *Employees Assn.*, 380 U.S. at 669. We conclude that there is no showing that the Board has failed to perform its duty to investigate or that it has acted in excess of its statutory authority. Thus the District Court properly held that it was without jurisdiction, and dismissal of ARINC's complaint was proper.

II

In denying summary judgment on the Teamsters' claim for mandatory injunction, the District Court concluded that "the strong arm of equity should not be exerted to compel the employer to bargain collectively with the union having a plurality of votes when by far the greater number of employees voted for no union at all. The Court may not set aside the certificate, but when its assistance is sought to be invoked by way of a decree in equity, the Court has a right to decline its assistance on the basis of equitable considerations."

In *Switchmen's Union* v. *Board,* 320 U.S. 297, 307, the Court did not decide "What is open when a court of equity is asked for its affirmative help by granting a decree for the enforcement of a certificate of the Mediation Board . . . ." Here we need not detail the powers of an equity court when faced with a suit for a mandatory injunction to compel compliance with section 2, Ninth of the Act. The District Court's refusal to grant the relief requested was based upon what it called "equitable considerations." It is clear, in our opinion, that the only arguable equitable consideration was that the Board's certification of the Teamsters did not represent the choice of the actual majority of all employees in the craft. But there could on this account have been an infirmity only if the Board had not fulfilled its statutory duty to "investigate" and determine the majority choice. "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act," section 2, Fourth. Since the contention to the contrary on this phase of the case has been rejected in our examination of whether the District Court had jurisdiction of ARINC's suit, and no other equitable ground has been made to appear on which relief should be denied, the decision of the District Court should be reversed. Cf. *Virginian Ry.* v. *Federation,* 300 U.S. 515, 559-562.

No. 20128—Affirmed.
No. 20251—Reversed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3010-65

AERONAUTICAL RADIO, INC., *Plaintiff*,

v.

NATIONAL MEDIATION BOARD, ET AL., *Defendants*.

Order

This cause came on for hearing on defendants' motion to dismiss or in the alternative for summary judgment. This motion is predicated, *inter alia*, on the contention that this Court lacks jurisdiction over the subject matter of plaintiff's suit. In view of the particular facts of this case and the pertinent authorities,[1] the Court is of the opinion that defendants' contention, namely, this Court lacks jurisdiction, is correct; therefore, it is this 6th day of April, 1966,

ORDERED that defendants' motion to dismiss be, and the same hereby is, granted.

OLIVER GASCH
Judge

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[1] *Virginian Railway Co.* v. *System Federation No. 40*, 300 U.S. 515 (1937); *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297 (1943); *Railway Clerks* v. *Employees' Association*, 380 U.S. 650 (1964)

Order

This cause came on to be heard on Intervenor-Defendant's Motion for Summary Judgment on its Counterclaim. After hearing argument of counsel in open court on May 27, 1966, and considering the foregoing Motion, Memoranda and Exhibits submitted by the parties, it is by the Court this 7th day of June, 1966

ORDERED, ADJUDGED AND DECREED that Intervenor-Defendant's Motion for Summary Judgment be, and it is hereby denied.

ALEXANDER HOLTZOFF, *Judge*

Seen:

RAYMOND G. LARROCA, ESQ.
800 World Center Building
Washington, D. C. 20006
Attorney for Plaintiff

APPENDIX C

AERONAUTICAL RADIO, INC., *Plaintiff*,

v.

NATIONAL MEDIATION BOARD, ET AL., *Defendants*,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Intervenor-Defendant*.

Civ. A. No. 3010-65.

United States District Court
District of Columbia.

May 27, 1966.

* * * * * * * * * * *

Raymond G. Larroca, Washington, D. C., for plaintiff.

David S. Barr, Washington, D. C., for intervenor-defendant.

HOLTZOFF, District Judge.

In an election conducted under the auspices of the National Mediation Board, the International Brotherhood of Teamsters was deemed by the Board as having been elected to represent certain classes of employees of Aeronautical Radio, Inc., and this Union was certified accordingly. The employer brought this action against the National Mediation Board to set aside the certificate. Another Judge of this Court dismissed the complaint for lack of jurisdiction over the subject matter. In the meantime, however, the International Brotherhood of Teamsters intervened as an additional defendant and has filed a counterclaim against the employer to require the employer to bargain with the Union collectively, that is, to negotiate in acccordance with the provisions of the Railway Labor Act, which is made applicable to the industry involved in

this action. The matter is now before this Court on the intervening defendant's motion for summary judgment on its counterclaim.

[1, 2] It is well established that there is no judicial review of a certification of the National Mediation Board certifying what organization, if any, is to represent certain groups of employees. Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297, 64 S.Ct. 95, 88 L.Ed. 61. This conclusion, however, is not unlimited. The Supreme Court in the Switchmen's case expressly left open the question what a Court of equity may consider when its affirmative help is asked to enforce the certificate of the Mediation Board and require the employer to bargain collectively with the Union so certified. In an action for equitable relief traditionally the Court may always consider matters that appeal to the conscience of a Court of equity and may weigh equitable elements.

[3] This Court will not go behind the certification of the National Mediation Board, but on its face the certificate discloses the following facts. The number of employees eligible to vote at the election was 400. Of these 179 did not vote. 147 voted in favor of the International Brotherhood of Teamsters. 74 voted in favor of Air Line Dispatchers Association, AFL-CIO.

The type of ballot used by the National Mediation Board makes no provision for a person who desires to vote that there be no union. This course is contrary to the practice of the National Labor Relations Board, which uses a type of ballot that contains a space for a voter to vote against having any union whatever. The validity of the type of ballot used by the National Mediation Board was sustained by the Supreme Court in Brotherhood of Railway and S. S. Clerks etc. v. Association for Ben. of Non-Contract Employees, 380 U.S. 650, 85 S.Ct. 1192, 14 L.Ed.2d 133. The Supreme Court, however, in holding that the type of ballot used by the National Mediation Board is legal

attached the qualification that under ballots of that type, eligible voters who do not vote must be deemed to have voted against having any union whatever.

[4]. Therefore, we have a situation where 179 voters must be deemed to have voted against any union whatever, 147 to have voted in favor of the International Brotherhood of Teamsters, and 74 to have voted in favor of Air Line Dispatchers Association, AFL-CIO. There is no majority, but the plurality, by far the greatest plurality, must be counted as voting for no union whatever.

Under the circumstances, the Court reaches the conclusion that the strong arm of equity should not be exerted in order to compel the employer to bargain collectively with the union having a plurality of votes when by far the greater number of employees voted for no union at all. The Court may not set aside the certificate, but when its assistance is sought by way of a decree in equity, the Court has a right to decline its aid on the basis of equitable considerations.

In the light of this discussion the motion for summary judgment on the counterclaim is denied.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1966

[Filed June 2, 1967]

No. 20,128

Civil 3010-65

AERONAUTICAL RADIO, INC., *Appellant*

v.

NATIONAL MEDIATION BOARD, ET AL., *Appellees*

No. 20,251

Civil 3010-65

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Appellant*

v.

AERONAUTICAL RADIO, INC., *Appellee*

Appeals from the United States District Court for the District of Columbia.

Before: Danaher, Burger and Wright, District Judges.

Judgment

These cases came on to be heard on the record on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court:

(1) that in case No. 20,128 the order of the District Court appealed from is affirmed; and

(2) that in case No. 20,251 the judgment and order appealed from is reversed, and this case is remanded to the District Court for proceedings not inconsistent with the opinion of this court.

Per Curiam

Dated: June 2, 1967

APPENDIX E

Constitutional and Statutory Provisions Involved

United States Constitution, Amend. V:

> ". . . [N]or shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Railway Labor Act, Section 2, Fourth, 48 Stat. 1187, 45 U.S.C. § 152, Fourth:

> Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: Provided, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during

working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Railway Labor Act, Section 2, Eighth, 48 Stat. 1187, 45 U.S.C. § 152, Eighth:

> Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Railway Labor Act, Section 2, Ninth, 48 Stat. 1188, 45 U.S.C. § 152, Ninth:

> If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class

for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Administrative Procedure Act, Section 10, 60 Stat. 243, 5 U.S.C. § 703:

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) Right of review.

Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) Form and venue of proceedings.

The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable

form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) Acts reviewable.

Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) Relief pending review.

Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency

action or to preserve status or rights pending conclusion of the review proceedings.

(e) Scope of review.

So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.